

March 22, 2006



Marlene H. Dortch
Secretary
Federal Communications Commission
TW-A325
445 Twelfth St., SW
Washington, DC 20554

Re: *Notice of Ex parte* presentation in WB Docket No. 05-211

Dear Ms. Dortch:

On March 20, 2006, Harold Feld and Ben Karpf of Media Access Project met with Commissioner Adelstien and Barry Ohlson with regard to the above captioned proceeding.

Mr. Feld stressed that the AWS auction, and other auctions involving spectrum that will provide a broad range of fixed and mobile services, require serious reconsideration of the auction rules. More than ten years has passed since the Commission first began to use auctions, spectrum auctions have been employed around the world, and a wealth of academic writing analyzing commission spectrum auctions and other spectrum auctions is available for the Commission to consider as part of its exercise of reasoned judgment. Further, AWS implicates numerous product markets (video, voice, data) in which the Commission intends to foster competition, and in which the Commission has a mandate to ensure deployment to all Americans. It is therefore entirely appropriate for the Commission to adopt the recommendations of NHMC, *et al.* and to adopt a system of anonymous bidding.

Mr. Feld pointed to three papers to incorporate into the record by reference which deal expressly with issues of collusion in FCC auctions. Peter Cramton and Jesse A Schwartz, "Collusive Bidding in the FCC Spectrum Auctions," Contributions to Economic Analysis & Policy 1:1 (2002); Richard Engelbrecht-Wiggans and Charles M. Kahn, "Low Revenue Equilibria in Simultaneous Auctions," Working Paper, University of Illinois, 1999; Sandro Brusco and Guiseppe Lopomo, "Collusion Via Signalling in Simultaneous Ascending Bid Auctions with Heterogeneous Objects, With and Without Complementarities," Review of Economic Studies 69:2 (2002), 407-436. In addition, Mr. Feld referred to the following papers by Paul Klemperer that discuss the problems of collusion in open ascending auction and the value of anonymous bidding in limiting collusion: "Using and Abusing Economic Theory," (2002); "What Really Matters In Auction Design," (2002); "How (Not) To Run Auctions: The European 3G Telecom Auctions" (2001).

The Rose Declaration attached to the comments of NHMC, *et al.* provide new, additional support for anonymous bidding and DE reform. As explained in the March 15 *ex parte* of NHMC, *et al.*, the Rose Declaration relies upon the FCC's own publicly available data. Accordingly, its validity is beyond reproach, and the results of the analysis are entirely reproducible by anyone wishing to replicate the extensive manual labor of creating one, uniform database out of the Commission's publicly available data.

Generally, as explained extensively in the literature cited above, tacit collusion in auctions occurs because each player can recognize the resource asymmetries between themselves and the other bidders and complementarities based on public information are recognized and understood. This allows parties to evaluate the level of "seriousness" when a bidder signals proprietary interest in a license. Further, because the bidders engage in multiple rounds in each auction, and in multiple auctions over time, there is plenty of opportunity to establish tacit "rules" and punish parties that disobey them (again, the literature cited above contains numerous examples from FCC auctions as well as from spectrum auctions in other countries).

The Rose Declaration identifies two patterns of collusive signals commonly used in FCC spectrum auctions. The "Type I" preemption bid occurs when a bidder immediately bids a very high amount for a license or when a bid for a license contains an odd trailing number. This warns other bidders that the Preemptor is "serious" about the license in question, will fight vigorously to defend it, and will punish others that attempt to fight for it. A "Type II" preemption bid is similar, but takes place in rounds other than the opening round. As described in the Rose Declaration, this strategy results in a substantial number of victories for preemptive bidders.

The preemptive strategy works because the other bidders know the identity of the Preemptor and know that the Preemptor can identify anyone who competes for the desired license. The potential competitor understands that the Preemptor can punish it by bidding on licenses it desires, particularly since the Preemptor knows from public information and bidding activity the licenses the potential competitor is most likely to want. As a consequence, the preemption strategy identified by Dr. Rose is frequently successful. The negative impacts of permitting such preemption strategy include reenforcement of concentration of licenses regionally and nationally, conferring unjust enrichment upon the Preemptor in the form of reduced auction price, and concomitant failure to maximize a return of value to the public.

Anonymous bidding significantly reduces the ability of parties to tacitly collude, and significantly reduces the likelihood that preemption will work. Because parties will not know the identities of bidders, there is no way to punish a rival who bids on a preempted license. In addition, because parties will not know their relative strengths, parties will have no way of assessing whether a competing bidder is a large company able to win by sheer size or a small company that can be easily outbid. As a

consequence, bidders must make bids based on the perceived value of the licenses rather than on the basis of strategic behavior and resource asymmetry.¹

Further, and of importance for future auctions, the parties cannot learn patterns of behavior or associate them with known information, reducing the ability to game the system. This increases the likelihood for new entrants, including minority bidders, gaining licenses.

In response to a question as to why even smaller incumbents oppose anonymous bidding, if anonymous bidding increases the likelihood of success for new entrants, Mr. Feld stated the following:

¹The old saw that increasing information “maximizes efficiency” advanced by some commentators represents a classic example of what Kelmerer refers to as the abuse of economic theory in the face of empirical evidence to the contrary. Certainly the auction is “more efficient” from the standpoint of the dominant bidders, who are able to capture licenses with minimal expenditure and effort. But this does not make the auction a better auction. To the contrary, if auctions are justified as a means of distributing licenses because they require applicants to put them to the most profitable use to recoup expenditures, disclosing the identity of the bidders makes the auction profoundly *worse* – whether the point of the auction is to maximize revenue or whether the point of the auction is to ensure an efficient distribution of licenses under the criteria enumerated in Section 309(j).

(A) All existing incumbents are those who have learned to benefit from the existing system. Because smaller incumbents cannot hope to displace larger incumbents, and fear entry by potential competitors (against whom they are much less capable of defending), any change in the existing game is far more likely to be worse (from the standpoint of the existing incumbents) rather than better. For this reason alone, *it is entirely predictable that nearly every incumbent would resist any substantial change*. The near unanimity of incumbents against anonymous bidding thus constitutes a powerful proof that the proposed change is pro-competitive and maximizes revenue return to the government.²

(B) Smaller entities wish to avoid potential costly bidding fights with larger bidders. They also would prefer to allocate resources to a few auctions where they have a greater likelihood of success, rather than bid on licenses they value more highly but will be contested by larger bidders. MMTC is correct that this can be characterized as “enabl[ing] applicants with limited resources but solid information about their competitors bidding strength to compete more effectively against better funded parties,” since the applicants with limited resources will chose not to compete at all. From a public policy standpoint, however, this result promotes concentration of licenses by discouraging competitive bidders and significantly reduces revenue from the auction.³

²Verizon Wireless represents the sole significant outlier in not opposing anonymous bidding.

³MMTC also appears to discount the impact of uncertainty on the “better funded” party. Because the “better funded party” does not know who it faces, and therefore does not know if it is “better funded,” it must recognize the possibility that it faces an adversary of equal size and therefore bid in a manner that respects the potential threat. Rather like a puffer fish or a cat hissing in nature, the smaller bidder can use anonymous bidding to appear bigger and potentially drive off better funded parties from desired licenses.

Turning to DE credits, Mr. Feld reiterated the arguments made in the comments of NHMC, *et al.* and the *ex parte* presentation of March 15, 2006. Because of the importance of AWS licenses, every effort should be made to encourage genuine new entry by DEs and avoid the ability to generate shams. Mr. Feld stressed the importance of post-auction enforcement in a timely manner as critical to ensuring that parties do not treat the DE requirements as a joke, or seek to game the system to their advantage. An expedited complaint process with significant penalties would deter parties from attempting to game the system.

In particular, the Commission should recognize that parties are infinitely clever in devising new ways to “push the envelope.” This is why the APA allows agencies to make determinations by adjudication (such as is done in the context of the indecency rules) rather than requiring a specific rule for every possible contingency that violates the intent and purpose of the rules.

Finally, it is entirely appropriate for the Commission to rely on a bright line rule, rather than a case-by-case approach as advocated by the Department of Justice. Nor need the rule be a perfect rule or the ultimate rule. The record supports a bright line rule excluding the largest wireless incumbents, while continuing to develop a record on whether other entities should be excluded from forming such material relationships. This decision does not prevent large wireless carriers from bidding on AWS licenses, nor does it prevent DEs from finding suitable partners and financing if the DE has a viable business plan.

With regard to future auctions, the Commission should begin examining how it can better promote ownership of licenses by minority-owned and women-owned businesses, and deployment of wireless services to minority communities, in accordance with Section 309(j). Mr. Feld urged that the Commission make use of existing task forces, such as the diversity task force, as well as consider creation of a new task force focused on the question of auction reform. In this way, the rulemaking for the 800 MHz spectrum auction could be properly informed by a wealth of data collected in a timely fashion and not under the pressure of a rulemaking.

In accordance with Section 1.1206(b) of the Commission’s Rules, 47 C.F.R. § 1.1206, this letter is being filed with your office. If you have any questions, please do not hesitate to contact me.

Respectfully Submitted,

Harold Feld
Senior Vice President

cc:

Commissioner Adelstien
Barry Ohlson